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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-398

FORTUNA CORPORATION,

Petitioner,

vs.

EDDIE WILKERSON,

Respondent

On Response to Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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STATEMENT OF THE CASE

This Petition for Writ of Certiorari originated from the United States District Court for the Western District of Texas, El Paso Division, in which the Court granted the Petitioner's Motion to Dismiss for lack of jurisdiction over the Petitioner, after a hearing pursuant to Rule 12 of the Federal Rules of Civil Procedure on April 23, 1975 (R. 57). Thereafter, the Respondent filed a Motion for New Trial or to alter or amend the judgment along with the proposed findings of fact and conclusions of law (R. 58). On June 25, 1975, the District Court entered an Order denying Respondent's Motion (R. 75). Respondent filed timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on July 24, 1975 (R. 76). After oral argument, the United States Court of Appeals on June 24, 1977 reversed and remanded the case to the District Court for further proceedings not inconsistent with Cause number 75-3306; Wilkerson v. Fortuna Corporation, 554 F2d 745 (5th Cir. 1977); said opinion further appearing as Appendix "A". On July 26, 1977, Petitioner's Petition for rehearing before the United States Court of Appeals for the Fifth Circuit was denied, a copy of said Order appearing as Appendix "B".

Respondent, Eddie Wilkerson, is a resident of El Paso County, Texas, and has his principal place of business as a "trainer" of horses in said County (TR8). The Petitioner, Fortuna Corporation, is a corporation organized under the laws of the State of New Mexico, which owns and operates, inter alia, a business known as "Sunland Park Race Track" located at Sunland Park, New Mexico (R. 30,31,32).

The Respondent, prior to August 25, 1972 and that year's horse racing "season" formally requested "stall space" at Sunland Park Race Track for several horses. Stall space on the race track grounds is a necessary pre-requisite for horses to compete in various races which occur during a particular "season". Again, prior to the racing season for the year 1973,

Respondent formally requested stall space. Notwithstanding the respective request by Respondent for the respective years' horse racing seasons, the Petitioner first reduced the number of stall spaces requested in 1972 and thereafter completely disallowed any stall space in 1973 (TR 9-16).

The Respondent received and filed his applications for stall space at the race track through the mail (TR 12, 13; R 35). Further, the Respondent testified at the hearing, and this was corroborated by the Petitioner's President, that the Respondent received the rejections for his stall applications through the mail (TR 15; R 35). The Petitioner's President further stated that it is customary practice for the Petitioner, Fortuna Corporation, to mail stall applications and/or futurity and derby nomination applications to Texas residents (R. 36). The Petitioner's President stated, in his answers to written interrogatories, that stall applications were mailed to Texas residents during the calendar year 1973; and that Sunland Park Race Track, through its racing Secretary or other persons, solicited entries for races to be held in the fall of 1973 from Texas residents in the State of Texas by telephone, mail or personal contact (R. 35).

The pleadings filed by Respondent in the District Court, reflect clearly that the Respondent's theory of recovery in this lawsuit are based upon both contract and tort. Therefore, for Respondent to have obtained jurisdiction over the Petitioner in the United States District Court of Texas, Respondent relied upon Rule 4 (e) of the Federal Rules of Civil Procedure

which provides that "the Court may employ the applicable and 'long arm statute' of the State in which it sits". The Texas long arm statute, Article 2031 (b), has been set forth in its entirety in Appendix "C".

ARGUMENT AND AUTHORITIES FOR NOT GRANTING THE WRIT

Petitioner, sets forth in his jurisdictional statement of his Petition for a Writ of Certiorari as a basis for this Court granting the writ Title 28, United States Code, Section 1254 (1) and Rule 19.1 (b) of the Rules of the Supreme Court of the United States. Title 28, United States Code, Section 1254, simply sets forth the statutory authority by which cases in the Courts of Appeals may be reviewed by the Supreme Court of the United States if a Writ of Certiorari is granted upon the Petition of any party to any civil or criminal case.

As this Court is well aware upon the review of any petition for a Writ of Certiorari, Rule 19.1 states:

> "a review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore". (Emphasis supplied)

Petitioner has relied upon Rule 19 (b) for the jurisdictional reasons that this Court should grant the Petition. The Respondent would submit that there is not one criterion set forth in Rule 19 (b) of the Supreme Court Rules which would form a basis for granting Petitioner's writ employing the "sound judicial discretion test". The decision of the United States Court of Appeals for the Fifth Circuit reversing and remanding this case to the District Court is not a decision which is in conflict with another Court of Appeals on the same matter; it is not a decision which decides an important State or Territorial question in a way in conflict with applicable State or Territorial law; it is not a decision which decides an important question of Federal Law which has not been, but should be settled by this Court; or has the Fifth Circuit Court of Appeals decided a Federal question in a way in conflict with the applicable decisions of this court as Petitioner alludes to on Page 6 of his Petition citing National Geographic Society v. California Board of Equalization, _____ U.S. _____, 97 S. Ct. 1386, 50 L. Ed. 2d, 631 (1977); or has the decision rendered by the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Honorable Court's power of supervision.

Therefore, all of Petitioner's arguments for granting this Writ under Rule 19. 1 (b) of the Supreme Court Rules, are obviously without merit, and Respondent submits that the decision of the Court of Appeals and its application of the law to

the facts clearly supports it's position.

The only reason Respondent has elected to file this Brief in opposition to the Petition for a Writ of Certiorari is due to the Petitioner's distortion and misinterpretation of the record concerning the characterization of the Respondent's lawsuit. Therefore, Respondent has been compelled to re-state the facts and law, which are clearly supported by the record.

The Petitioner in Pages 9-12 of his Petition, relies heavily upon three criterion for this Court granting his Writ of Certiorari. First, that Respondent's pleadings allege a cause of action arising in New Mexico; second, that the record shows Respondent's cause of action arose in New Mexico; and last, that the Court of Appeals opinion basically holds the location of Petitioner Sunland Park Race Track is New Mexico, but near El Paso, Texas and its advertising in El Paso, Texas confers jurisdiction on Courts in Texas. None of these propositions are supported by the facts or the law. Conveniently, Petitioner has left out a considerable part of the Fifth Circuit's opinion which is totally supported by the record. In support of this statement, the Respondent would set forth the following facts which are more than sufficient to establish "minimum contacts with Texas" thereby conferring jurisdiction under Texas law over the Petitioner:

The Petitioner, Fortuna Corporation, maintains a telephone number and listing in the El Paso Telephone Directory, listed under "Tracks" (TR 16). The Petitioner, directly or indirectly, distributes

discount admission cards to hotels, motels, and other locations in El Paso, Texas, entitling the holder of such cards to discount admission to the Sunland Park Race Track (R 37). The Petitioner, through its President, admits to placing advertisements for Sunland Park Race Track in the El Paso Times or the El Paso Herald Post, which are El Paso newspapers (R 37). The Petitioner admits and it is confirmed by the Respondent's testimony that the Petitioner does extensive advertising on billboards, radio and television in the El Paso area (TR 16; R 37). The President of Petitioner's corporation, stated in cross-interrogatories that the total money spent for advertising in the calendar year 1973 for place mats, discounted admission cards, newspaper, radio and television is substantial (R 37). The Petitioner's President further stated that the race track purchases food for the race track from distributors located in the State of Texas (R 38). The race track employs personel who reside in the State of Texas and its officers and agents live in El Paso County, Texas (R 38, 39). The evidence further is undisputed that the Petitioner corporation has held luncheons in El Paso, Texas; holds a race known as the "West Texas Futurity"; and that on any given racing day there are more Texas horses (meaning Texas "bred and foal" horses) on the racing program than any other State in the Union (TR 18, 19).

Based upon all of the above recited facts the Respondent would refer this Honorable Court to the reasoning of the Court of Appeals conferring jurisdiction under Texas law over the Petitioner

corporation at Pages 5a, 6a, 7a and 8a, of the Appendix "A".

In response to any possible argument by Petitioner regarding the denial of any "Federal Due Process" as a basis for this Court granting his Petition the Respondent would submit that this has heretofore been answered by the Fifth Circuit on Pages 8a, 9a and 10a, citing National Geographic Society v. California Board of Equilizations, _____ U.S. _____, 97 S.Ct. 1386, 51 L. Ed. 2d, 631 (1977).

Perhaps, the Fifth Circuit has already best summarized your Respondent's position to any possible Federal Due Process contentions being in conflict with applicable decisions of this Court wherein at Page 10a of the Appendix it is stated:

> "It is more than enough to satisfy Federal Constitutional Due Process, in the case at bar, to establish that Fortuna's fortunes were continuously and intimately linked with El Paso."

CONCLUSION

Since Petitioner has failed to set forth one single criteria under Rule 19.1 (b) giving this Court a basis for granting his Petition for a Writ of Certiorari, the Respondent prays that his Petition be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief in Opposition to the Petition for Writ of Certiorari filed herein has this date been served upon Mr. James F. Hulse, Scott, Hulse, Marshall and Feuille, 11th Floor, El Paso National Bank Building, El Paso, Texas 79901, Attorneys for Petitioner.

DATED October 12th, 1977.

VICTOR K. SIZEMORE